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In the Supreme Court of the United States

OCTOBER TERM, 1979

ALVIN BARON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Alvin Baron (hereafter, defendant), prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Opinion of the Court of Appeals is reprinted as Appendix A, *infra.*

JURISDICTION

The Opinion of the Court of Appeals was entered on August 9, 1979. Defendant's timely Petition for Rehearing En Banc was denied on September 18, 1979 (Appendix B, *infra.*) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 22(2) of the Rules of this Court.

QUESTIONS PRESENTED FOR REVIEW

I.

The opinion of the Seventh Circuit Court of Appeals that would hold that it was not error to admit into evidence five memoranda written by Bryant that were consistent with his trial testimony is at war with the decision of another panel of that court in *United States* v. *Guevara,* 598 F.2d 1094, (7th Cir., 1979) and the decision of the Second Circuit in *United States* v. *Quinto,* 582 F.2d 226 (2nd Cir., 1978).

II.

The trial court violated Rule 30 Federal Rules of Criminal Practice by stating it would give an instruction, allowing defense counsel to rely on that instruction in his closing argument, and then not giving that instruction.

STATEMENT OF THE CASE

The defendant was convicted after a jury trial of one count of solicitation of a bribe to influence an employee benefit plan (Title 18 U.S.C., §1954), five counts of a scheme to defraud by wire (Title 18 U.S.C., §1343, and one count of filing a false income tax return (Title 26 U.S.C., §7206(1)).

Briefly stated, the defendant was charged with obtaining $200,000 from Foy Bryant for arranging a $1.3 million loan from the Central States Pension Fund (hereafter referred to as "the Fund" or "the Pension Fund"). The loan went to Mount Vernon Memorial Park (hereafter referred to as "Mt. Vernon"), a combination cemetery and mortuary owned by Foy Bryant. The loan was approved in December of 1974. Bryant alleged that he paid the money to Alvin Baron in three installments between December of 1974 and March of 1975.

On September 15, 1978, the defendant was sentenced to the custody of the attorney general for a period of two years and was fined $5,000.

ISSUES

I.

THE OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS THAT WOULD HOLD THAT IT WAS NOT ERROR TO ADMIT INTO EVIDENCE FIVE MEMORANDA WRITTEN BY BRYANT THAT WERE CONSISTENT WITH HIS TRIAL TESTIMONY IS AT WAR WITH THE DECISION OF ANOTHER PANEL OF THAT COURT IN UNITED STATES V. GUEVARA, 598 F.2d 1094 (7th Cir., 1979) AND THE DECISION OF THE SECOND CIRCUIT IN UNITED STATES V. QUINTO, 582 F.2d 226 (2nd Cir., 1978).

Foy Bryant, the chief government witness, testified that in January of 1975, at the suggestion of an outside auditor, he began preparing memoranda of his dealings with the defendant Baron because of the tax ramifications of his alleged payments to Baron. (Tr. 474-475) The government offered these memoranda into evidence.[1]

Over the vigorous objection of the defendant, the Court allowed these memoranda into evidence relying on Rule 801(d)(1)(B) of the Federal Rules of Evidence. (Tr. 980) In addition, these were sent to the jury for scrutiny as exhibits during its deliberations.

---

[1] Of the five memoranda, only two were dated (government Exhibit 20(b)(3) and 20(f). These memoranda were dated February 21, 1975, and March 12, 1975 respectively. The other three memoranda were undated (government Exhibits 19(f), 19(g), 19(h). Bryant testified that he prepared these undated memoranda in January of 1975. (Tr. 475-476) These three dealt with events which occurred from November 29, 1974 to January 14, 1975—the period of time in which the alleged scheme evolved.

These memoranda should not have been admitted into evidence and should not have been sent to the jury room. In a case where the verdict depended on one man's word against another, they had a devastatingly prejudicial effect on the outcome. We will show that they reinforced in an improper manner Bryant's sworn testimony. As counsel said at the time he objected, "This will be like giving the jury six pages of the transcript . . ." (Tr. 973-974).

Consider the prejudice to the defendant that occurred by allowing Bryant's memoranda into evidence and to go to the jury room as exhibits. First, they were prominent in the jury's consideration, similar to transcripts of his testimony. It is hornbook law that transcripts of a witness' testimony are not sent back to the jury. These memoranda had the added imprimatur of being accepted as evidentiary items. This, in itself, glorifies them entirely out of proportion.

In *United States* v. *Bates,* 407 F.2d 590, 594 (7th Cir., 1969), the Court reversed a conviction in which a stipulation was sent back to the jury. Senior Judge Major stated as follows:

> "With the conflict between Bates and Dr. Anagos thus emphasized, it is not unreasonable to believe that the jury regarded it as affecting Bates' credibility and that the stipulation was utilized to resolve any doubt on this score against him." (P. 593)

It is interesting to note that the defense counsel in *Bates* objected to the stipulation stating:

> "It is just as if the jury had not recalled the testimony of a particular witness, and the Court requested the court reporter to prepare a transcript and send it in to the jury. This is extremely prejudicial, and I don't think it is proper." (P. 592)

To which the able trial judge agreed.

In *United States* v. *Judon,* 567 F.2d 1289, 1294 (5th Cir., 1978), the court vacated a conviction and remanded a case in which it held that it was error to admit an FBI statement into evidence. Noting that a document admitted under Rule 803(5) (past recollection recorded) is specifically precluded from receipt into evidence as an exhibit unless offered by an adverse party, the court stated:

> "The drafters precluded the receipt of recorded recollection as an exhibit of the proponent of the memorandum in order to *prevent the trier of fact from being overly impressed by the writing.* 11 J. Moore, Federal Practice §803(5)[5] (1976)." (Emphasis added)

Second, the prosecutors relied heavily on the admissibility of the memoranda in their closing arguments. In the first segment of the closing argument, the prosecutor harped on them as having probative value. (Tr. 3079, 3080, 3082) In the second segment of the closing argument, the prosecutor equated them to Bryant's testimony itself, giving them an importance that exceeded Bryant's trial testimony. (Tr. 3154)

Thirdly, Baron did not make memoranda of his conversations and dealings with Bryant. Since Baron did not engage in illegal activities with Bryant, he had no need to make memoranda. He had no motive *ante litem motam,* either for defense against a possible prosecution for accepting a kickback, or for explanation to the IRS. But the jury surely must have concluded that his testimony was less worthy of belief than Bryant because he lacked memoranda.

Fourthly, since there were instances where Bryant was impeached on cross-examination *vis-a-vis* his trial testimony and his memoranda, there is no way of knowing whether the jurors relied on its collective memory of the

evidence, as they are supposed to do, or on the memoranda, which are not accurate or true in every respect, even if one believes the main thrust of Bryant's testimony, i.e. that he gave Baron kickbacks.

It is not difficult to see the bootstrapping effect of sending Bryant's memoranda back to the jury. After all, the memoranda comport with his testimony. But if the testimony is false, then the memoranda are false. However, the memoranda are no substitute for the testimony under oath. To the jurors, the memoranda were the equivalent of his testimony. See *United States* v. *Quinto*, 582 F.2d 226 (2nd Cir. 1978).

In *Coltrane* v. *United States*, 418 F.2d 1131, 1140 (D.C. Cir. 1969), a reversal from which then Circuit Judge Burger dissented without opinion, Judge Spottswood set forth the following summary of the state of the law regarding the admissibility of extrajudicial declarations (as Bryant's memoranda must be considered) prior to the Federal Rules, with generous citations to Wigmore on Evidence:

> "When a witness' testimony stands without attempted impeachment, his out-of-court-utterances are ordinarily inadmissible. *Even where impeachment of the witness is sought by a showing of inconsistency between the two, a previous extrajudicial declaration consistent with his testimony is normally inadmissible for the simple reason that mere repetition does not imply veracity.* Prior statements by the witness are admitted—and then only for rehabilitative purposes—only in those few exceptional situations where, as experience has taught, they could be of clear help to the factfinder in determining whether the witness is truthful." (Citations omitted). (Emphasis added)

In pertinent part, the Rule 801(d)(1)(B) relied upon by the trial Court states as follows:

> "(d) A statement is not hearsay if

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . .
>
> (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . ."

There can be no question that Bryant's memoranda are prior consistent statements. They track his trial testimony with minor exceptions. In fact, on each of the three occasions Bryant told his story—(1) the making of the memorandum, (2) the interview with Fund officials, and (3) his trial testimony—Bryant consistently told the *same* tale, i.e. he gave $200,000 to Baron to bribe Baron in connection with the Teamster's loan. Therefore, we agree their admissibility is governed by Rule 801(d)(1)(B). But their admissibility is contingent upon an attack by the defendant against Bryant's trial testimony as being either (1) a recent fabrication, or (2) the result of improper influence or motive. As Judge Weinstein stated in his treatise:

> "Prior consistent statements are given substantive effect by Rule 801(d)(1)(B) if they are admitted to rebut charges of recent fabrication or improper influence or motive." 4 J. Weinsten & M. Berger, Evidence Sec. 801(d)(1)(B)[0] at 801-99 (1977).

Rule 801(d)(1)(B) was correctly analyzed and properly applied by the Court recently in *United States* v. *Robert McPartlin*, 595 F.2d 1321 (7th Cir., 1979). In sustaining the Government's objection to the testimony of an accountant's notations on a bank statement, and the bank statement itself, all of which would have supported the defendant's theory regarding a financial transaction, Judge Sprecher stated:

> ". . . it is argued that the evidence was admissible under Federal Rule of Evidence 801(d)(1)(B) as a

prior consistent statement. We do not believe, however, that these statements were admissible under this theory. Evidence offered under this theory must have some probative value in rebutting the implied charge of recent fabrication or improper motive. *However, where a motive to falsify also existed at the time of the earlier statement, it possesses no such probative value.* As Judge Weinstein correctly pointed out in his treatise on the Federal Rules:

> 'Substantive use under Rule 801(d)(1)(B) is limited to situations where high probative value is most likely. . . . Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force "for the simple reason that mere repetition does not imply veracity"' " (Emphasis added)

Because there is an elipse in the portion cited with approval in *McPartlin,* cited *supra,* and because Judge Weinstein's treatise is so highly thought of, we cite at length from page 801-100:

> "Substantive use under Rule 801(d)(1)(B) is limited to situations where high probative value is most likely. Evidence which conteracts a suggestion that the witness changed his story in response to some threat or scheme or bribe by showing that his story was the same prior to the external pressure is highly relevant in shedding light on the witness' credibility. Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force 'for the simple reason that mere repetition does not imply veracity'.
>
> Since Rule 801(d)(1)(B) provides that the prior consistent statement may be accorded substantive use only if it is used *to rebut* an express or implied charge, impeachment of the witness is a precondition. The

> Advisory Committee's notes are silent as to whether the substantive effect of the rule extends to situations where the prior consistent statement is admitted not to rebut an inconsistent statement but to refute an imputation of inaccurate memory on the part of the witness by showing that he made the same statement when the event was recent. Normal usage would argue that the words 'fabrication', 'influence' and 'motive' are only intended to cover situations where the witness deliberately changes his story. Rule 801 (d)(1)(B) should apply only when there is some suggestion—even if it is slight—that the witness consciously altered his testimony after making the inconsistent statement by which he has been impeached.
>
> The care with which the draftsmen narrowed the scope of 801(d)(1)(A) in order to limit substantive use of prior statements, suggests a fairly narrow interpretation of this clause to situations in which rehabilitation through consistency would formerly have been allowed." (Citations omitted).

Here, Bryant never changed his story so that there could be a basis for the implied charge that his trial testimony was either altered or fabricated. An intervening changed story is the *sine qua non* that gives rise to introduction of consistent statement made prior to the changed story under Fed. R. Evid. 801 (d) (1) (B).

In *United States* v. *Quinto,* 582 F.2d 226 (2nd Cir., 1978), the court reversed a conviction under circumstances so similar to the instant case as to give one the sensation of *deja vu* upon reading the opinion.

In the *Quinto* trial, the following occurred: (1) an I.R.S. agent testified at the trial about an interview with the defendant; (2) defense counsel attacked the credibility of the agent; (3) the government attempted to rehabilitate the agent by introducing the memorandum of that interview; (4) the memorandum was consistent with the agent's

testimony at trial; (5) the trial court ruled that the cross-examination on the agent's credibility implied a recent fabrication or improper motive and, therefore, decided that the memorandum was admissible under Fed. R. Evid. 801(d)(1)(B); and (6) the memorandum went with the jurors into the jury room during their deliberations.

The court in *Quinto* held that the memorandum should have been excluded regardless of whether it was offered for the truth of the matters asserted or merely for the more limited purpose of rehabilitating the in-court testimony of the agent.

Judge Waterman's opinion in *Quinto* contains an excellent analysis of the state of the law prior to the enactment of the Rule, along with an exegesis of it's present application. The opinion contains case law as well as citation to Professor Wigmore's treatise and to Judge Weinstein's most recent analysis.

The *Quinto* opinion starts with the general caveat that:

> "For nearly 200 years last past, the courts have enforced, except in certain very limited circumstances, a general prohibition against the use of prior consistent statements." (p. 232).

The court in *Quinto* stated that the rationale for excluding most prior consistent statements offered to establish the witness's credibility is one of relevancy and that repetition of a witness's story is not relevant to the trustworthiness of the statement.

The court in *Quinto* held that to satisfy the requirements of Fed. R. Evid. 801(d)(1)(B),

> ". . . the proponent must demonstrate three things. First, he must show that the prior consistent statement is 'consistent with [the witness's in-court] testimony.' Fed.R.Evid. 801(d)(1)(B). Second, the party offering the prior consistent statement must establish that the statement is being 'offered to rebut an express or implied charge against [the witness] of recent fabrication or improper influence or motive.' *Id.* Finally, it is necessary that, as was the situation under the law of evidence prior to the adoption of the Federal Rules of Evidence, see, e.g., *United States* v. *Check, supra,* at 680-681; *United States* v. *Fayette, supra,* 388 F.2d at 733; *United States* v. *Gruenwald, supra,* 233 F.2d at 566, the proponent must demonstrate that the prior consistent statement was made prior to the time that the supposed motive to falsify arose, ..."

The opinion of the court below advanced for the first time a theory of admissibility that was not raised by the government in lower court or upon appeal. In fact, during oral argument, this court did not ask a question about this theory and so counsel for the defendant was never permitted to respond to such a theory. The opinon holds the memoranda admissible under Rule 106 of the Federal Rules of Evidence. Rule 106 simply means that when counsel for the defendant here asked a question concerning a part of the memoranda, government's counsel had the right on redirect examination to inquire as to statements in other parts of the memoranda relevant to and clarifying of the questions asked on cross-examination. Rule 106 doesn't justify the jury having memoranda with them during deliberations.

The opinion would also claim that the consistent memoranda were admissible under 801(d)(1)(B) to rebut an express or implied charge of recent fabrication. First, the questions of Bryant on cross-examination concerned his failure to voluntarily report the alleged bribe to any authorities and did not involve an allegation of a changed story. Second, the jury was aware through the

direct examination of Bryant that he had prepared contemporaneous memoranda that accused Baron of soliciting the bribe and, therefore, even if there had been a charge of recent fabrication, the jury would have had the fact of the preparation before them. The full contents of the memorandum themselves added nothing to a determination of whether there had been a recent fabrication.

The proposed opinion would close its eyes to *Quinto* by holding that a rule of evidence would turn on the fact that the witness in *Quinto* was an I.R.S. agent. Unless the panel below read the transcript in the *Quinto* case, counsel is amazed to have the opinion state that the I.R.S. memoranda was not used on cross-examination.

Naturally, the credibility of Bryant was attacked. If it was not, the plea should have been guilty. But this opinion would stand for the proposition that every time credibility of a witness is attacked, any statement consistent with his trial testimony (whether it be his grand jury testimony or a letter to a brother-in-law) would be admissible. The *Quinto* case reveals that not only did the defendant there attack the agent's credibility, but he took the witness stand and denied making the statement to the agent.

In *United States* v. *Guevara,* 598 F.2d 1094 (7th Cir., 1979) the rebuttal testimony of DEA agents' conversation with the chief government witness was held to be inadmissible under Rule 801(d)(1)(B). The court said:

> "The fallacy of the government's position is that testimony corroborating a declarant's prior testimony does not necessarily rebut an implied charge of improper motive, where the prior testimony is alleged to be based upon the improper motive. Thus, the fact that Segal's testimony was substantiated by Nedoff's rebuttal testimony does not remove the implication of improper motive from Segal's prior testimony."

If this case is to be decided under the Rule and the law rather than a theory that fits only this individual, the conviction should be reversed.

II.

THE TRIAL COURT VIOLATED RULE 30, FEDERAL RULES OF CRIMINAL PRACTICE, BY STATING IT WOULD GIVE AN INSTRUCTION, ALLOWING DEFENSE COUNSEL TO RELY ON THAT INSTRUCTION IN HIS CLOSING ARGUMENT, AND THEN NOT GIVING THAT INSTRUCTION.

At the conference on instructions, the trial court told counsel that he would follow his usual procedure of giving certain instructions from the reprint of 27 Federal Rules Decisions, including Section 3.05 of 27 F.R.D. He then indicated the ground rules for objections. (Tr. 2927-2928)

Section 3.05 of 27 F.R.D., 69 (1961) states as follows:

> "3.05 — *Impeachment — Inconsistent Statements — Falsus in Uno Falsus in Omnibus*
>
> A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.
>
> If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.
>
> If a witness is shown knowingly to have testified faslely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves." 27 F.R.D. 69 (1961)

Prior to this, the defense had offered, as part of his instructions, a paragraph covering what he considered an

important point in the case. Paragraph 2 of the defendant's instruction number 11 (Volume II, R. 72, p. 11) states as follows:

> "If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; you may reject all the testimony of that witness or give it such credibility as you may think it deserves."

The colloquy leading up to the Court's indication that he would give Section 3.05 as stated above is as follows:

> "The Court: Now then, we will go to 3.05. Do you want me to give 3.12 without the 'however'? A Defendant who wishes to testify as a competent witness and the Defendant's testimony is judged the same way as any other witness.
> Mr. Smith: Yes.
> The Court: 3.12.
> Mr. Smith: Leave out the 'however'?
> The Court: Yes, the 'however' is irrelevant in a case where you don't have one Defendant who doesn't testify and one Defendant who does.
> Mr. Tucker: So we have got 3.02, 3.05 and 3.12.
> The Court: No, 3.02 was stricken. Mr. Smith objects and Mr. Herbst concurs." (Tr. 2932)

Since the Court had told counsel it would give Section 3.05 in its entirety, defense counsel withdrew its instruction number 11. (Tr. 3010)[2]

However, when the Court charged the jury, he did not instruct them in terms of paragraph three. (Tr. 3182-3185) After the jury was excused to deliberate, defense counsel immediately objected and asked the Court why

[2] Prior to the withdrawal, the judge stated: "11 is certainly covered." (Tr. 3031)

instruction 3.05 was not given to the jury as it is set forth in 27 F.R.D. (Tr. 3216) The following ensued:

> "The Court: No, no. I gave that portion of that instruction which I intended. I didn't give that false, or false omnibus. I said the equivalent of that.
> I said you may give the testimony of witnesses such credibility as you think it deserves. Actually, what that says, you know, is just about what I said.
> Mr. Smith: I think you dealt only with inconsistent staatements, Judge.
> The Court: No, I said he may be discredited or impeached by contradictory evidence or by evidence that at other times a witness made statements which are inconsistent. If you believe any witness has been impeached or thus discredited, it is your exclusive province to give the testimony of that witness such weight and credibility as it deserves.
> I left out, testify falsely, because I don't think that is relevant to this case.
> Mr. Smith: The only thing is, there were so many statements that Bryant denied making, whereas the other witnesses, we had abut (sic) six of them that said yes, he did make those statements, and that was a big part of my argument, your Honor, and I would wonder if your Honor would consider giving that.
> The Court: I did not believe that the evidence was such that I should give—I would mave thought the same argument could be applied to Mr. Baron with respect to testifying falsely and it seemed to me that it was not appropriate to suggest to the jury that anybody here was knowingly testifying falsely, that they might have erroneous recollections, to be sure somebodybody (sic) must have an erroneous recollection. You can't have contradictory stories without it, but I did not believe that the testimony was such as to indicate that anybody was knowingly testifying falsely on a material matter." (Tr. 3216-3217)

If the judge sat through the same trial attended by defense counsel and heard the same testimony as defense

counsel, and listened to closing arguments, how could he, in good conscience, state that he did not think "that anybody was knowingly testifying falsely on a material matter"?

Rule 30 of the Federal Rules of Criminal Procedure mandates that the trial judge inform counsel before final arguments of the instructions he intends to give the jury.[3] In *Wilkerson* v. *Meskill,* 501 F.2d 297 (9th Cir., 1974), the trial judge failed to comply with Rule 30, not giving an instruction that he said he would. In reversing the conviction, the court stated in a *per curiam* opinion:

> "The focus of our inquiry must be on the effect which the Court's misleading indications regarding the requested instructions had on the content of counsel's argument. 'The obvious object of the rule in point is to require the judge to inform the trial lawyers in a fair way what the charge is going to be, so that they may intelligently argue the case to the jury.' *Ross* v. *United States,* 180 F.2d 160, 165 (6th Cir. 1950).
>
> In this instance, Harvill's counsel argued to the jury after receiving misleading assurances that his instructions on specific intent would be given. Although only a portion of his closing argument stressed

[3] Rule 30 states in pertinent part:

". . . any party may file written requests that the court instruct the jury on the law as set forth in the request. * * * The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.
As amended Feb. 28, 1966, eff. July 1, 1966."

> this issue, we cannot conclude that 'the effectiveness of counsel's argument and hence of appellant's defense' was not impaired by counsel's inaccurate information regarding the Court's charge. *Wright* v. *United States, supra,* 339 F.2d at 580. See also *United States* v. *Mendoza,* 473 F.2d 697 (5th Cir., 1973)."

This court reversed a conviction in *United States* v. *Dichiarante,* 385 F.2d 333 (7th Cir., 1967) because the trial judge, in his instruction, used language that deprecated the defense theory in an important respect. The trial judge indicated to the jury that either the narcotics agents or the defense witnesses were liars, whereas the defense theory was that the agents were mistaken in their observavations. What occurred in the instant case is that the trial judge did not instruct the jury, as he said he would,—that false testimony on one area could contaminate all areas of a witness' testimony.

The focus of *Dichiarante* is on the right of defense counsel to have his theory of defense presented to the jury without the trial judge's comments during its charge denigrating that theory. By omitting to instruct as he said he would, the trial judge in the instant case did the same thing. He allowed defense counsel to argue that falsity in one area of testimony could be used in weighing other areas of testimony and then did not instruct in conformity with that theory, as he said he would.

With the credibility of Foy Bryant the central issue in the case, the argument of counsel as it was, and the basis in the record for such argument, it was prejudicial error for the trial judge to deviate from Rule 30 as he did. This is not the situation where the court changed or omitted an instruction and informed counsel before the conclusion of this closing argument. *United States* v. *Bautista,* 509 F.2d 675, 678 (9th Cir., 1975).

The opinion below reveals a complete misapprehension of the mandatory nature of the requirement of Rule 30 of the Federal Rules of Criminal Procedure, as well as absence of knowledge of courtroom procedures involving the purpose and effect of the trial court's final charge to the jury.

The opinion at page 11 incorrectly states the trial court "indicated that he would give *substantially* the instruction from Section 3.05. . .". The trial court said nothing about substantially giving Section 3.05; he said he was going to give Section 3.05 (Tr. 2923). Nothing can be clearer than the fact that prior to argument, the trial court promised to give the "false in one false in all" instruction.

After hearing the defense argument which relied heavily on the particular test of judging Bryant's credibility, the trial judge deliberately chose to eliminate the "false in one" instruction from its charge. It was not a question of giving the instruction in substance or unintentionally omitting it, the trial judge *decided* to reverse his position and not give the instruction. When defense objected to the charge that left out this instruction, the trial court said:

> "I left out, testify falsely, because I don't think that is relevant to this case." (Tr. 3216-17)

The convoluted reasoning found at pages 11-12 of the opinion below indicates that remarks of the trial judge given after cross-examination of the first witness about failure of recollection somehow put the defense on notice that the judge would not give the "false in one" instruction even though he promised to do so.

The proposed opinion at page 12 also seems to hold that the instruction on credibility about failures of recollection somehow covers the "false in one" instruction. This is surprising in light of the fact that Judge Cummings, during oral argument, asked counsel for the government a question to the effect: "Although we know that Judge Will talks his instructions, is there anything in the charge that even *remotely* covers the false in one instruction requested by Mr. Smith?". (Although these remarks are in quotes, we do not represent that the question posed by Judge Cummings is reflected verbatim.)

The proposed opinion fails to understand the unique test of credibility involved in the "false in one" instruction. It is a test apart from prior inconsistent statements or failure of recollection. Nothing can be more damaging to a witness' credibility than the fact that he made a false statement under oath. The jury should have been so instructed.

The sole issue in this case was whether or not Bryant was telling the truth when he said he gave Baron a $200,000 bribe. The thrust of the final argument, and for that matter the defense, was that the jury should not believe Bryant on that basic question because it had been demonstrated that he lied while testifying at trial in regard to other relevant facts.

On cross-examination, Bryant denied he had certain conversations with Mr. DeStefani, one of his accountants; Mr. Mathiesen, a trustee of the Fund; Mr. Esslinger, the President of a California bank where Bryant withdrew the funds; Ms. Chantry, a teller at the same bank, and Mr. Chuckray, an accountant for the Fund. Each of the five witnesses testified and swore that Bryant did have such conversations with them.

In reliance on the promised instructions of the trial court, counsel, in final argument, addressed the various tests for determining the credibility of Bryant. The argument in respect to the test of false in one false in all is set out in part:

"Now, on the question of his credibility, his believability. When he tells you about giving the money to Al Baron, you also can look at his other testimony to see if he was contradicted by any other witness, by witnesses, by all the witnesses.

Bryant swore that he absolutely did not tell DeStefani that the removal of the trust fund monies was just a mistake and that a check was made out to the wrong account. He said, absolutely not.

DeStefani swears that he did. It is his own accountant." (Tr. 3114).

* * *

"Bryant categorically denies having said to Matheson in 1966, or at any time, that the Fund had better give him consideration on his request because he had paid for the first loan. Bryant denies saying anything like that. Albert Matheson swears that he did. He is a liar.

Bryant swears that he didn't get upset with Esslinger when he, Esslinger, told someone else, Miss Chantry, to check and try to get the monies together for him because he mentioned the trust account, and when Miss Chantry called up either the office or Stratton.

Esslinger swears that he did, and he swears, and Barbara Chantry swears of a conversation like this with Mr. Esslinger, that Bryant was upset." (Tr. 3115-3116)

* * *

"Bryant swore that he never said to Charles Chuckray that he would make one interest payment today, one week later, and propose a sale to the builder, and then tell the government to go to hell.

Now, we are not getting at this point, we will later, but we are not getting into the meaning of that at this point.

The fact is he swears that he didn't say anything like that to Charles Chuckray." (Tr. 3116).

Mere argument of counsel on this point is meaningless unless the argument is reinforced by the *court's* charge that if they found that in denying these conversations, the witness lied, then "you may reject all the testimony of that witness or give it such credibility as you may think it deserves." Rejection of Bryant's testimony was rejection of the government's case that he had given Baron a $200,000 bribe.

The last paragraph of the opinion below completely out of touch with what happened in this case, and further turns Rule 30 into an insignificant discretionary act contrary to *United States* v. *Harvill,* 501 F.2d 295, 297 (9th Cir., 1974); *Wright* v. *United States,* 339 F.2d 578 (9th Cir., 1964); *Ross* v. *United States,* 180 F.2d 160 (6th Cir., 1950); *United States* v. *Mendoza,* 473 F.2d 697 (5th Cir., 1973); *United States* v. *Dichiarante,* 385 F.2d 333 (7th Cir., 1967).

In *Harvill,* the court reversed the conviction and said:

> "In this instance, Harvill's counsel argued to the jury after receiving misleading assurances that his instructions on specific intent would be given. Although only a portion of his closing argument stressed this issue, we cannot conclude that 'the effectiveness of counsel's argument and hence of appellant's defense' was not impaired by counsel's inaccurate information regarding the Court's charge."

In *Mendoza,* the court stated:

> "Although we *recognize that the evidence against the* [*defendant*] *is nearly overwhelming,* we cannot say with reasonable certainty that the outcome would be the same if the defense had argued before the jury with accurate information about the Trial Judge's proposed action upon the requested jury instructions." (emphasis supplied)

The trial court here assured counsel that he would give the specific "false in one" charge. Counsel constructed

his argument in the belief that the imprimatur of the court's charge would require the jury to apply that specific test of credibility. The trial court's deliberate refusal to give that instruction after argument constituted a violation of Rule 30 and requires reversal.

CONCLUSION

For the above stated reasons, petitioner respectfully requests that this court grant a Writ of Certiorari to review the judgment of the United States Court of Appeals of the Seventh Circuit.

Respectfuily submitted,

RAYMOND J. SMITH

Attorney for Petitioner

APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 78-2222

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALVIN BARON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-Cr-1248—Hubert L. Will, *Judge.*

HEARD JUNE 13, 1979—DECIDED AUGUST 9, 1979

Before SWYGERT and CUMMINGS, *Circuit Judges,* and CAMPBELL, *Senior District Judge.**

CUMMINGS, *Circuit Judge.* The defendant was the asset manager of the Teamsters' Central States Pension Fund. On June 30, 1978, he was convicted after a jury trial of one count of solicitation of a bribe to influence an employee benefit plan (18 U.S.C. § 1954), five counts of a scheme to defraud by wire (18 U.S.C. § 1343) and one count of filing a false income tax return (26 U.S.C. § 7206(1)). The charges arose out of a $200,000 fee defendant solicited from Foy Bryant in regard to a 1.3 million dollar loan the Pension Fund extended to a corporation owned by Bryant. Defendant argues on appeal

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* Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation.

that his conviction should be reversed because: (1) the trial judge prejudiced the defendant by the manner in which he conducted the trial, (2) certain memoranda were erroneously admitted into evidence and (3) the judge failed to give an instruction he had told defense counsel he would give and upon the expectation of which counsel relied in his closing argument. We affirm.

The Trial Court's Questions and Comments Did Not Prejudice The Defendant.

At both the beginning and the end of the trial Judge Will told the jurors that his questions to witnesses were "not to help one side or the other," that his questions should not be given more weight than questions asked by counsel, and that the jurors alone were to judge the evidence (Tr. 12, 3172, 3181, 3186-3187, 3205). The transcript reveals that the judge questioned witnesses for both sides and made evidentiary rulings that were adverse to both sides.

As defendant concedes, "[t]here is no question that the trial judge may take an active part in the examination of witnesses during a jury trial" (Br. 28). *United States* v. *DiVarco,* 484 F.2d 670 (7th Cir. 1973); *United States* v. *Siegel,* 587 F.2d 721 (5th Cir. 1979); *United States* v. *Esquer,* 459 F.2d 431 (7th Cir. 1972). However, a trial judge may not conduct such questioning in a way that is likely to communicate to the jury the judge's belief in the defendant's guilt. *United States* v. *Dellinger,* 472 F. 2d 340 (7th Cir. 1972); *United States* v. *Tobin,* 426 F.2d 1279 (7th Cir. 1970); *United States* v. *Hill,* 332 F.2d 105 (7th Cir. 1964). The defendant has set out sixteen specific instances of rulings, comments or questions by the court which he claims prejudiced his case. We have examined these examples in context as well as other comments by the trial court, and we conclude that the com-

plaineed-of incidents were not designed to and did not in fact prejudice the defendant. The *Dellinger, Tobin* and *Hill* cases, all *supra*, are distinguishable because they all involved far more intrusive and prejudicial questioning. Moreover, in each of those cases the judge interrogated the defendant himself, whereas here the objection is to questions posed to various witnesses which the defendant claims undercut his theory of the case.

Defendant's theory was that his accuser, Foy Bryant, had embezzled the $200,000 from trust funds held by his corporation and had concocted the story of bribing the defendant for the two-fold purpose of exculpating himself and attempting to blackmail the Pension Fund into making additional loans to him and not revealing his defalcation. Telephone and travel records established that defendant and Bryant had been in contact at the times Bryant said the demands for money were made and that the two men were in the same cities on the dates Bryant said he delivered the money to defendant. The defense contended that the telephone calls involved legitimate business regarding the loan and that Bryant followed the defendant to Burlingame, California, and to Las Vegas in order to establish potential access as part of the frame-up scheme. In their attempt to discredit Bryant, defense counsel emphasized inconsistencies in various versions of the story Bryant had given. Some of these inconsistencies were very minor indeed, the defense theory being that cumulatively they would establish a pattern of adjusting the story to fit the documentation. We are convinced that defense counsel were allowed to develop their theory fully despite the rulings they object to. The district court properly exercised its discretion to avoid an excessively long trial and confusion of the jury.

Bryant's Memoranda Were Properly Admitted Into Evidence.

Defendant's second argument on appeal is that it was reversible error to admit into evidence memoranda written by Bryant shortly after each payment to defendant was planned or made. The memoranda describe essentially the same course of events that Bryant testified to at trial. In a defense counsel's opening argument he told the jurors that he would seek to establish that Bryant had framed defendant to protect himself. On direct examination of Bryant, the Government elicited the fact that he had made memoranda of the cource of the bribery soon after each of the important events. The reason Bryant gave for making the memoranda was that his accountant had advised him to document the payments so that he would not have to pay income tax on the $200,000 that had been withdrawn from the corporate account and was otherwise unaccounted for (Tr. 474-475). The contents of the memoranda were not brought out on direct examination. After Bryant's direct testimony the Government sought to introduce the memoranda. The trial court declined to admit them at that point, commenting

> "I suspect at some point they will go in. I think it is inappropriate at this point to admit them because they are no more than a memorialization of what he testified to from his recollection, and they don't really add anything to his testimony, unless his testimony is challenged, which so far it has not been." (Tr. 525-526.)

On cross-examination of Bryant, a defense counsel referred repeatedly to the memoranda. He first elicited the fact that Bryant never furnished the memoranda to the Pension Fund, did not bring the memoranda with him to the meeting at the Pension Fund at which he revealed the payments to defendant, did not tell the Pension Fund of the payments to defendant until a fund employee

accused him of stealing the money himself, and paused before revealing to the Fund that it was defendant to whom he had paid the money (Tr. 540-544). Later in the cross-examination counsel brought out discrepancies between the memoranda and Bryant's trial testimony.[1] In the course of this cross-examination, portions of the memoranda that were assertedly inconsistent with Bryant's direct testimony were read to the witness. Occasionally there ensued extended and confusing colloquies about what the memoranda actually said and whether they were inconsistent with the witness' testimony (Tr. 647-650, 671-675, 703-704, 747-753). On direct examination, the Government sought to have Bryant read the memoranda to the jury, but the court rejected this suggestion, commenting

> "if they can be reproduced and circulated to the jury after they have been received, assuming they are received that is fine, but we are not all going to sit here while Mr. Bryant goes on for an hour reading pages of memoranda * * *" (Tr. 824).

Subsequently, the court admitted the memoranda over defendant's objection and allowed copies of them to be before the jury while it was deliberating. In admitting the memoranda, the trial judge relied on Rule 801(d)(1)(B) of the Federal Rules of Evidence.[2] He first noted that

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[1] These discrepancies involved dates on which phone calls had been made, dates on which certain matters were discussed, and whether Bryant's son accompanied him when he made one payment or waited in the hotel lobby.

[2] Rule 801(d)(1)(B) provides:

> "(d) *Statements which are not hearsay.* A statement is not hearsay if—
>
> "(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statements is * * * (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive * * *."

Bryant had testified that his purpose in making the memoranda was to create documentation for tax purposes.[3] The judge then commented:

> "Now, certainly, what you have suggested in your opening argument, is that this story of Mr. Bryant's today is a fabrication and is inaccurate, and that it is false, and here is a statement which is consistent with his testimony in part, and inconsistent in part.
>
> "It was used extensively in cross examination to show inconsistencies. I don't think you can have it one way only, and that is that you can use the statement, which was a contemporaneous statement at the time, to show that his recollection then was different in some respects from what his recollection is now, but the Government cannot put the statement in to show that his recollection then was consistent in other respects with what his testimony was now, what his recollection is now.
>
> "It seems to me that what you are trying to do is have your cake and eat it too. That is, use the statement solely to show that on the earlier occasion he had some differences in his recollection, as distinguished from what his testimony was, but that it is not permissible for the Government to show that at the same time his recollection at the earlier date was consistent with his testimony here." (Tr. 979-980.)

Defendant argues that admitting this evidence was erroneous for two reasons: (1) for Rule 801(d)(1)(B) to apply, the witness must have been impeached by a prior inconsistent statement, and (2) the memoranda are irrelevant and self-serving because the defendant had the same motive to falsify at the time he created them as he did when he testified.

[3] As the court indicated, if Bryant made the payments to defendant, creating a record for tax purposes would be a proper motive for the memoranda. If, on the other hand, Bryant appropriated the money himself, writing the memoranda could have been not only for the purposes of framing defendant and blackmailing the Fund (as defendant suggested) but also to avoid tax fraud charges—all of which are clearly improper purposes.

We cannot agree that the only situation in which Rule 801(d)(1)(B) would apply is when a witness has been impeached by a prior inconsistent statement. Judge Weinstein in his treatise on evidence discussed Rule 801(d)(1)(B) in that context,[4] and clearly that is one situation in which the Rule would be useful. However, neither the language of the Rule itself nor the cases so limit the Rule. *United States* v. *Rinn*, 586 F.2d 113, 119 (9th Cir. 1978); *United States* v. *Williams*, 573 F.2d 284, 289 (5th Cir. 1978); *United States* v. *Lanier*, 578 F.2d 1246, 1253-1254 (8th Cir. 1978). Rule 801(d)(1)(B) applies when the credibility of the witness has been attacked by a charge of recent fabrication or improper motive, regardless of whether the credibility of the witness is assaulted through his own prior inconsistent statements or by some other means. In addition, here defense counsel really were trying to impeach Bryant through his own prior and assertedly inconsistent statements in the memoranda. The issue then became the extent to which the prior statements in the memoranda were inconsistent with Bryant's testimony. Although on cross-examination certain discrepancies were emphasized, it was debatable whether these were real inconsistencies, depending upon how one interpreted ambiguities in both the memoranda and the testimony. Moreover, the asserted inconsistencies went to details and the major portions of the memoranda were consistent with Bryant's testimony. We agree with the trial judge that in these circumstances it would have been unfair and extremely con-

[4] 4 J. Weinstein & M. Berger, Evidence, Sec. 801(d)(1)(B)[0] at 801-100 (1977).

fusing to the jury not to admit the memoranda.[5] The memoranda were thus admissible under Rule 106 of the Federal Rules of Evidence.[6] Although the trial court did not rely explicitly on that Rule, the reasons he expressed support its application. Since as a matter of law it was not error to admit the evidence, the order should be affirmed even if the district court relied on a different ground. *Zbaraz* v. *Quern,* 596 F.2d 196, 202 n. 19 (7th Cir. 1979).

Additionally, we agree with the district court that the memoranda were admissible under Rule 801(d)(1)(B). Clearly they come within the literal terms of that exception tc the hearsay rule. The real question is whether they should have been excluded as irrelevant under Rule 402. We agree with the defendant that if Bryant had the same motive to falsify at the time he prepared the memoranda, they would add nothing to his testimony. Here the defense contends that the intent to frame defendant was formed from the very beginning of the scheme, that the memoranda were simply part of that plan, and that they are therefore irrelevant to refute the defense's allegation of improper motive. The defendant testified that the

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[5] When defense counsel objected to the admission of the memoranda, the court commented:

"You used them wherever it was advantageous * * *.

"At this stage of the game there was no objection to them. If those documents aren't now part of the record in this case, the poor jury is never going to be able to evaluate the cross examination * * *." (Tr. 938-939.)

[6] Rule 106 provides:

"Remainder of or Related Writings or Recorded Statements

"When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statements which ought in fairness to be considered contemporaneously with it."

memoranda were prepared for legitimate tax purposes and the district court apparently credited this account[7] (Tr. 977, 978, 985-986). The memoranda themselves, of course, reveal nothing of their author's motivation.

Defendant relies heavily on *United States* v. *Quinto,* 582 F.2d 224 (2d Cir. 1978), for the proposition that when a defendant attacks prosecution testimony and a consistent prior memorandum prepared by the prosecution as being part of a single scheme to inculpate him, the memorandum is not admissible evidence. *Quinto* would not in any event control this case because of many factual differences. Importantly, the defendant in *Quinto* had made no attempt to use the memorandum for impeachment of the prosecution's witness.[8] The fact question of whether the motive to falsify existed at the time the memoranda were prepared may well be one for the jury, and here the defense

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[7] It may well be true as defense counsel point out, that the Internal Revenue Service would not have accepted Bryant's self-documentation of what he did with $200,000 cash. While this might tend to discredit Bryant's testimony that he wrote the memoranda to create a record for legitimate tax purposes, other objective evidence discredited the defense theory that defendant was the victim of an elaborate frame-up (Tr. 982).

[8] Other differences between *Quinto* and the present case include the fact that the memorandum in *Quinto* was potentially more prejudicial than those involved here because it was prepared by an Internal Revenue Service agent and recounted in extraordinary detail his version of an interview with defendant in which defendant purportedly admitted that his intention had been "to screw the government out of some cash." The trial court initially excluded the memorandum. However, after the defendant made a general attack on the agent's credibility and produced witnesses who contradicted the agent's testimony in other respects, the judge *sua sponte* admitted the memorandum. In this case the memoranda were prepared by a witness, not by a government agent, and the defendant was clearly warned that an attack on the credibility of the witness based on the memoranda might well necessitate their being admitted.

vigorously presented its fabrication theory throughout the trial.[9] We need not reach that question however, because here the cross-examination at least implied that Bryant first faricated his story when he was accused of appropriating the money in April 1976 (over a year after the last memorandum was written) or that the improper motive (self-exculpation) first arose at that time.[10] The jury might well have inferred that this was what one defense counsel was suggesting from his emphasis at the beginning of his cross-examination on the fact that Bryant had never implicated defendant until he himself was accused, did not bring the memoranda with him to the April 1976 meeting and hesitated before naming defendant as the recipient of the money. Numerous cases have held that the charge of recent fabrication or improper motive need not be express. *United States* v. *Rinn, supra; United States* v. *Williams, supra; United States* v. *Lanier, supra.* The fact that defense counsel may not have intended to imply that Bryant's story was fabricated beginning in April 1976 is irrelevant if that inference fairly arises from the line of questioning he pursued. To the extent the jury could have inferred that the defendant was suggesting that Bryant first concocted his story in April 1976, the

[9] The trial court would still have discretion to exclude such evidence under Rule 403 of the Federal Rules of Evidence when in the circumstances of a particular case—as in *Quinto*—the probative value of the evidence was outweighed by the danger of unfair prejudice.

[10] In *United States* v. *McPartlin,* 595 F.2d 1321, 1351 (7th Cir. 1979), we refused to admit a prior consistent statement under Rule 801(d)(1)(B) because the motive to falsify also existed at the time of the prior statement. *McPartlin* is distinguishable from this case because there the prior consistent statement was not made until two years after the event it purported to explain, there was no suggestion that defendant's consistent explanation offered at trial was recently fabricated, and no reason to believe that the prior statement was motivated by anything other than self-exculpation.

memoranda which were nearly contemporaneous with the events in question were admissible to rebut that implication under Rules 801(d)(1)(B) and 402.

Thus the contents of the memoranda were admissible for several reasons. We cannot conclude that admitting the memoranda themselves was reversible error in the circumstances of this case. The district court indicated that giving the memoranda to the jury was preferable to reading them into evidence to expedite the case (Tr. 824). Numerous other documents were also before the jury. Most importantly, the case turned on whether the jury believed that Bryant had concocted the whole story, including the memoranda. If the jurors had believed that defense theory, it is inconceivable that they would have been swayed by reading the self-serving memoranda.

The Refusal To Give A Requested Instruction Was Not Reversible Error.

Defendant's final argument is that the trial court erred in first representing that it would give a version of the "false in one, false in all" instruction[11] and then refus-

[11] The disputed instruction is part of Section 3.05 of the instructions reprinted in 27 Federal Rules Decisions. That instruction reads:

> "A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony.
>
> "If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you think it deserves.
>
> "If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves."

The trial judge's omission of the third paragraph of Section 3.05 is the basis of appellant's claim.

ing to do so after defense counsel had based his closing argument on the expectation of that instruction. This assertedly was a violation of Rule 30 of the Federal Rules of Criminal Procedure, which provides that a judge shall inform counsel of the instructions he intends to give before closing arguments. However, as the cases cited by defendant demonstrate, such a failure to comply with Rule 30 constitutes reversible error only if it impairs the effectiveness of the defense. *Wilkerson* v. *Meskill,* 501 F.2d 297 (9th Cir. 1974); *United States* v. *Dichiarante,* 385 F.2d 333 (7th Cir. 1967).

We are convinced that the defendant was not seriously misled as to the instructions that would be given and that in any event the effectiveness of the defense was not impaired. In the conference regarding instructions prior to closing arguments, Judge Will indicated that he would "talk" his instructions to the jury, rather than reading them. He then indicated that he would give substantially the instruction from Section 3.05 without stating that he intended to omit the third paragraph. However, earlier in the trial when defense counsel had objected to the court's curtailing their pursuit of certain inconsistencies in Bryant's testimony about details, Judge Will stated

> "You are trying to show that Mr. Bryant is a liar, and I am suggesting to you that the understandable misrecollections about infinitesimal details, doesn't make a man a liar, and you are not going to make him a liar—I am going to instruct the jury to the extent they find discrepancies between present and prior recollection, they must not automatically assume that the witness' testimony is therefore not believeable, because we know that erroneous recollection as well as total failure of recollection are ordinary common human phenomenon [*sic*] * * *." (Tr. 966.)

Therefore defense counsel were clearly on notice of the type of instruction that was to be given. Moreover, the charge included a lengthy instruction on credibility in which the court repeatedly told the jury that a witness could be impeached by many different factors and that the testimony of a witness so impeached need not be credited. Defense counsel's closing argument had emphasized the theory that Bryant had completely fabricated the story. We see nothing in Judge Will's instructions that would undermine this theory. Essentially the judge told the jurors that they could find from inconsistencies in Bryant's testimony and failures of recollection as well as from other factors that his testimony was totally unworthy of belief, but that they were not required to find that he was lying solely on the basis of differences in recollections over details.[12]

While it would have been preferable for the trial court to state more explicitly the instructions he intended to give, defendant suffered no prejudice in this case. The judgment is affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[12] Clearly the judge thought that he had given substantially the instruction agreed upon (Tr. 3216).

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 18, 1979

Before

Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILLIAM J. CAMPBELL, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 78-2222 vs.

ALVIN BARON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-Cr-1248 — Hubert L. Will, Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendant-appellant, Alvin Baron, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing: Accordingly,

It Is Ordered that the aforesaid petition for rehearing be, and the same is hereby, Denied.

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* Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, is sitting by designation and did not participate in the *en banc* petition for rehearing.